everywhere with the persons; inseparable from them as their shadows."

The judgment in that case was upheld by the House of Lords, (11 E.R. 703). Lord Campbell L.C. said at page 709:

"There can be no doubt of this general rule, that a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere. But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated." Later, he said (at page 711): "It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions."

In view of the authorities it is clear that the marriage in this case is not valid. The petition for divorce is, therefore, dismissed.

Petition dismissed.

Solicitors: *Rikhraj & Co.*

MALAYSIAN REPORTS

GAN HAY CHONG v. SIOW KIAN YUH & ANOR.

[F.C. (Suffian L.P., Ong Hock Sim F.J. and Chang Min Tat J.) April 1, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 154 of 1974]

Practice and Procedure — Appeal — Application for extension of time within which to file memorandum of appeal and to serve it on respondents — Mistake of solicitor — Insufficient ground in the circumstances — R.S.C. 1975, O.59 r.2.

This was an appeal from the decision of Ajaib Singh J. reported in [1975] 1 M.L.J. 41 dismissing the application of the appellant for extension of time to file the memorandum of appeal and to serve it on the respondents.

Held, dismissing the appeal: the mistake of the appellant's solicitors in the circumstances of this case, did not constitute a sufficient ground for granting the extension of time.

Cases referred to:-

(1) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228.

(2) *Ahmad bin Yahaya & Anor.* v. *Ahmad bin Sulaiman* [1972] 2 M.L.J. 109.

(3) *Cheah Teong Tat* v. *Ho Gee Seng & Ors.* [1974] 1 M.L.J. 58.

(4) *Chin Hua Sawmill Co. Sdn. Bhd.* v. *Tuan Yusoff bin Tuan Mohamed* [1974] M.L.J. 58.

(5) *Chong Kuong Ying & Ors.* v. *Louis Lavagna* [1972] 1 M.L.J. 180.

FEDERAL COURT.

Atma Singh Gill for the appellant.

S. G. Thakurta for the respondent.

Chang Min Tat J.: This appeal is from the refusal of the learned trial judge to exercise his discretion in favour of the appellant who on his advice had applied to the High Court for extension of time for filing and serving the memorandum of appeal.

Judgment was given against the appellant on June 8, 1972. Notice of appeal was filed on June 14, 1972, well within the period of the 14 days specified in Order XXXIX, rule 2(3) of the Subordinate Court Rules and also within time, served on the respondent.

Consequent on this notice of appeal, the Sessions Court at Kuala Pilah, the court appealed from, set about preparing the appeal record as laid down in Order XXXIX rule 3. This particular rule is in these words:—

"R.3(1). When the appellant has complied with the requirements of rule 2 of this Order ..., the court appealed from shall prepare the requisite number of copies of the appeal record and the appeal record shall contain copies of....

(2). As soon as the appeal record is ready the court appealed from shall serve the appellant with a notice in Form 40."

The notice under Order XXXIX rule 3(2) was served on the appellant's solicitors on May 23, 1974 but they were not on that day served with the appeal record. That was of course understandable. It was clear from the notice which was a specified form, being Form 40 of the Subordinate Court Rules, that they were only advised that the record was ready and that the costs of preparing such record were a certain sum and due by them to the court. It was only upon their request and subject to the payment of such costs that the Registrar of the court appealed from would supply them with a copy of the appeal record and upon payment of such additional costs as were required to be paid, with sufficient additional copies for service on the other side, as might be required.

Both parties are agreed that the appellant's solicitors were served with the record on May 26, 1974. This must mean that the costs for the record were paid either on or prior to this date. Mr. Atma Singh filed the memorandum of appeal on June 9, 1974, which was on the 16th day after service on him of the notice in Form 40, one of the intervening days being a non-day. He failed on that day to effect service on the respondents. He only did so on June 12, 1974 after he had been given another copy or copies of the appeal record by the court. This could mean that when he paid the costs and was supplied a copy, he did not ask or pay for and was not therefore supplied with, an additional copy or copies for service on the respondents.

In respect therefore of the filing in court and service on the respondents of the memorandum of appeal, the appellant was out of time, by 2 days on the former and on the latter by 5 days, if the rules specified 14 days, running from May 23 and not from May 26. On this point Mr. Atma Singh contended that nowhere did rule 3 or any rule in Order XXXIX specify this period or lay down when this period ran.

It is somewhat unfortunately not realized or not sufficiently realized that an appeal from a Subordinate Court to the High Court involves registration in the registries of two courts. Insofar as the Subordinate Court Registry is concerned, its work is, subject to a last task of executing the order of the superior court after the appeal, finished after supplying the appellant with the required copies of the appeal record, and forwarding to the Assistant Registrar of the High Court appealed to, the remaining copies of the record, endorsed with the date of Form 40: see Order XXXIX rule 3(4)(b). Thereafter the High Court Registry takes over and the Rules of the Supreme Court become effective and applicable. The particular order is of course Order 59 — Appeals from Subordinate Courts and Statutory Bodies. An appellant has to file in the Registry of the High Court his appeal record and the grounds of his appeal which together constitute the memorandum of appeal, in Form 23 of the First Schedule to the Rules of the Supreme Court. The relevant rules are:—

"O.59 r.1: On receiving an appeal record under Order XXXIX of the Subordinate Courts Rules, 1950, the Assistant Registrar shall enter the appeal in a list of appeals from Subordinate Courts.

r.2: (1) The appellant shall, *within fourteen days from the date of service on him of the notice referred to in Order XXXIX, rule 3 sub-rule (2)* of the Subordinate Courts Rules, 1950, or within such extended time as the High Court may allow, file in the High Court in duplicate a memorandum of appeal in Form 23 in the First Schedule hereto.

(2) The appellant shall *within the like period serve* each respondent with a copy of such memorandum and a copy of the appeal record."

In rule 2(1), a period of 14 days is given for filing and service of the memorandum of appeal. The period runs from the service of the notice in Form 40 and not from the service of the appeal record. Therefore while it is true as Mr. Atma Singh contended Order XXXIX Subordinate Court Rules does not limit the time for filing and service of the memorandum of appeal, it is not correct to say that there is no rule which does not so limit the time. The appellant was therefore out of time.

But while he was out of time, he was not out of court in applying for extension of time. Rule 2(1) of Order 59 of the Rules of the Supreme Court, apart from the general provisions for extension of time in Order 64 rule 7, R.S.C., gives power to the court to extend time. It therefore became a matter for the judicial exercise of the judge's discretion.

On the attitude of the Appellate Court to the exercise by a judge of the discretion vested in him, Mr. Thakurta for the respondents drew our attention to the following concise statement by the Privy Council in *Ratnam* v. *Cumarasamy & Anor.*[1] at page 229: —

"The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130 *per* Lord Wright at p. 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans* v. *Bartlam* [1937] A.C. 473). Upon question of procedure the Board is slow to interfere with the discretion exercised by a lower court (*Mayor of Montreal* v. *Brown & Anor.* (1876) 2 App. Cases 168)."

The same judgment contains a pertinent remark on Rules of Court. It reads:

"The Rules of Court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time-table for the conduct of litigation."

Ratnam's case itself was an application for extension of time to file and serve the record of appeal, on appeal from the High Court to the then Court of Appeal. Order 58 rule 22(6) of the Rules of the Supreme Court sets the time for filing at 6 weeks after the entry of appeal but discretion is reserved by "within such further time as the court may allow." The reason given for the delay was that the appellant had hoped for a compromise settlement. In rejecting the application, the Court of Appeal did not appear to have given any reasons but the Privy Council accepted that the Court of Appeal was entitled to take the view that this did not constitute material upon which they could exercise their discretion in favour of the appellant. The point was that the Privy Council found it impossible to say that the discretion of the Court of Appeal was exercised upon any wrong principle.

When the appeal came up for hearing, the then counsel for the respondents objected to the hearing, contending that the appeal was out of time. The learned judge then directed the appellant to make an application for extension of time. At the hearing of this application, counsel for the respondents again opposed it. He repeated the two cases he had cited earlier on: *Ahmad bin Yahya & Anor.* v. *Ahmad bin Sulaiman*[2] and *Cheah Teong Tat* v. *Ho Gee Seng & Ors.*[3] and cited another case *Chin Hua Sawmill Co. Sdn. Bhd.* v. *Tuan Yusoff bin Tuan Mohamed.*[4] He then submitted that no special grounds had been advanced. The learned trial judge took the view that —

"... the appellant failed to show sufficient grounds upon which the court could extend time for filing and serving the memorandum of appeal. To say that the appellant had a good appeal on its merits was not a sufficient ground by itself without showing some other circumstances of a kind which

the court could accept as a reasonable excuse for not filing and serving the memorandum within the prescribed period. The remaining grounds submitted by counsel for the appellant afforded no reasonable excuse for the delay. With regard to the submission that counsel had to read and re-read a voluminous appeal record in order to prepare the memorandum of appeal I need only state that the record including the exhibits was certainly not that voluminous as to require more than a few days to appraise oneself of the issues involved and it should not have taken very long for the appellant's solicitors to prepare a memorandum of appeal. If the appellant's solicitors were in real difficulty about preparing the memorandum they should have manifested it by applying for an extension of time promptly upon receiving the appeal record on May 26, 1973. A memorandum of appeal is normally set out in a concise form and there is provision for its amendment on terms after it has been filed to correct any error or omission. The memorandum of appeal which the appellant's solicitors eventually filed in court contained nine short paragraphs spread over three typewritten sheets of paper of which almost a page consisted of the heading and other formal parts of the appeal."

He concluded that a mistake by a solicitor was not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum of appeal.

If he had taken the view that the mistake of the appellant's solicitors in the circumstances of this case was not such a ground, his view would, with respect, be unexceptionable but as a general dictum, it went, to my mind, too far.

Then the learned judge went on to give the authority of the decided cases on which he had relied to justify his conclusion. They were two: *Chong Kuong Ying & Ors.* v. *Louis Lavagna*[5] and *Chin Hua Sawmill Co. Sdn. Bhd.* v. *Tuan Yusoff bin Tuan Mohamed.*[4]

These are decisions of the Federal Court which are, if in point, binding on him. It was at this stage that the learned judge, with respect, misdirected himself. They were not in point. In the first place, both cases were cases where the appellant had to apply for extension of time to file a notice of appeal. Without a notice of appeal, no appeal was in existence. Here a notice of appeal had been filed. There was an appeal, but there was no record for it to be heard, unless time was extended for its filing. In the second place, these two cases were appeals from the High Court to the Federal Court. The rule applicable was Order 58 rule 15 of the Rules of the Supreme Court which provided —

"(1) No appeal shall, except by special leave of the full Court of Appeal, be brought after the expiration of one month. . . ."

It must be immediately obvious that the requirement of the special leave of the full Court of Appeal lays on any applicant a heavier burden than the ordinary leave of a lower court to win over the exercise of judicial discretion in his favour and that to cite or to rely on cases on the discharge of the burden for special leave in deciding whether ordinary leave should not be granted is to apply the wrong principle.

Our Order 58 rule 15, R.S.C., continues to apply the rigidity of the pre-1909 English rule. Pre-1909 English cases continue to be of assistance in our reading of Order 58 rule 15, R.S.C., but they are no longer applicable in England itself where the procedure has been relaxed and a dilatory litigant now has only to seek the leave of the court below or the Court of Appeal: see 1962 *Annual Practice* Order 58 rule 13 and rule 14. I need only to reproduce the following note at page 1697:

"Application for extension of time for appealing:

. . . It is entirely in the discretion of the court to grant or refuse an extension of time. It may for example, be granted where the omission to appeal in due time was due to a mistake on the part of a legal adviser (*Gatti* v. *Shoosmith* [1939] 3 All E.R. 916 C.A.). The fact that the Court of Appeal has, in a subsequent case, taken a different view of the law from that of the court below is not of itself a sufficient ground for an extension of time for appealing, but the circumstances as a whole may justify it (*Craig* v. *Phillips* (1877-8) 7 Ch. D. 249 C.A.). The length of time that has elapsed is always a material factor in the grant or refusal of leave to appeal out of time."

to show how much more lenient the court is where special leave is not involved.

Since the learned trial judge had, with regret, proceeded on a wrong principle, it behoves us, sitting on appeal, to examine whether the facts merit the exercise of judicial discretion in favour of the appellant. On the facts as disclosed, it does not appear possible to challenge Mr. Atma Singh's contention that he had read the 14 day period in rule 2(5) of Order XXXIX Subordinate Court Rules to run from the date of service of the appeal record on him and not from the service of the notice that the appeal record was ready but he was advised well within time by a letter dated May 28, 1973 from the solicitors for the respondents of the requirement in Order 59 rules 2(1) and (2) of the Rules of the Supreme Court and he could not really contend that he remained in ignorance of this rule. He would or should have been disabused of his earlier mistake by this later advice.

I feel fairly confident that if the learned trial judge had applied the right principle to the facts, he would have come to the same conclusion and refused leave.

I would dismiss this appeal with costs. Deposit to the respondents against taxed costs.

Suffian L.P. and **Ong Hock Sim F.J.** concurred.

Appeal dismissed.

Solicitors: *Atma Singh Gill & Gill; Allen, Gledhill & Ball.*

RE KONG MUN CHEONG & ANOR.; MALAYA INDUSTRIAL AND MINING CORPN. BHD. v. OFFICIAL ASSIGNEE, MALAYSIA

[F.C. (Suffian L.P., Ong Hock Sim F.J. and Chang Min Tat J.) April 1, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 157 of 1974]

Bankruptcy — Offer of composition with creditors — Deed of assignment not registered — Act of bankruptcy — Subsequent garnishment with notice of available act of bankruptcy — Ineffective as against Official Assignee — Bankruptcy Act, 1967, s. 3(1)(h).

In this case the bankrupts had called a meeting of their creditors and made an offer of 70% by way of composition to their creditors. This offer was later embodied in a circular addressed by their accountants to the creditors. Subsequently the appellant, who was one of the creditors, obtained a sum of $67,319.95 under a garnishment order in satisfaction of a judgment debt from the bankrupts to the appellants. The Official Assignee applied for payment over of this sum. The High Court ([1975] 1 M.L.J. 224) gave judgment in favour of the Official Assignee and the appellant appealed.